Petitioner went to trial on March 7, 2002, and was acquitted on all charges still pending against him in Carroll County District Court. On or about March 7, 2002, all the charges pending against Petitioner were resolved in his favor either by acquittal or dismissal with prejudice.

REASONS FOR GRANTING THE PETITION

This petition for a writ of certiorari should be granted because of the need to have this Court set parameters around permissible searches under the evolving case law of the Patriot Act. The officers in this case blamed their overreaction to Petitioner's presence at an individual's home with a package on the post-9/11 paranoia and the need to protect citizens from terrorism. This Court must balance the public's protection against individual rights to be free from unreasonable searches and seizures.

Petitioner does not contest the initial stop called into the officer by a police dispatcher; but does contest the actions taken during the stop, the length of the stop, the legality of the search during the stop, and the subsequent arrest. Petitioner was cleared of all charges; yet he had to endure an unreasonable search and seizure, delay of his trip, loss of his property, humiliation and embarrassment, loss of his job, and damage to his reputation. In an egregious violation of personal freedoms, the District Court improperly dismissed Petitioner's claims and the Sixth Circuit Court of Appeals improperly upheld the dismissal of most of the claims. Certainly, this Court does not want the police allowed to overreact to threats of terrorism; thereby destroying the basic personal freedoms guaranteed by the U.S. Constitution.

The Fourth Amendment of the Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Time and again, this Court has observed that searches and seizures "conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions." ***Thompson v. Louisiana***, 469 U.S.17, 19-20 (1984). Petitioner's right to be free from unreasonable search and seizure was violated by the acts of Respondents.

Section 1983 creates a federal cause of action to redress violations of rights protected by the Constitution of the United States. Respondents moved for summary judgment claiming qualified immunity protects them from trial upon Petitioner's claims. Under the clearly delineated test for evaluation of the application of qualified immunity, Respondents' evidence fails to provide them protection on their claims.

Under the Sixth Circuit's standard, Respondents' were not entitled to summary judgment on their claim of qualified immunity because Petitioner alleges a violation of a clearly established constitutional right and there are genuine factual disputes regarding whether Respondents actions were objectively reasonable in light of his rights. The three-step inquiry is as follows:

> (1) "Whether the facts viewed in the light most favorable to the plaintiff show that a constitutional violation has occurred."

> (2) "Whether the right that was violated was a clearly established right of which a reasonable person would have known."
>
> (3) "Whether the plaintiff has alleged sufficient facts, and supported the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights."

Toms v. Taft, 338 F.3d 519, 524 (6th Cir. 2003); ***Feathers v. Aey***, 319 F.3d 843 (6th Cir. 2003); ***Radvansky v. City of Olmsted Falls***, 395 F.3d 291, 302 (6th Cir. 2005).

The Sixth Circuit erroneously held **the initial stop**, in its entirety, was constitutional and therefore, Respondents were entitled to qualified immunity on the stop. Petitioner appeals and seeks review by this Court. The Sixth Circuit reversed the district court's finding of qualified immunity on **the arrest** finding there was a lack of probable cause for the arrest and that such an arrest (without probable cause) violated a clearly established right and was objectively unreasonable. Petitioner agrees the wrongful arrest must go to a jury. The Sixth Circuit erroneously affirmed the district court's dismissal of the claim on **the search** finding it did not violate Petitioner's due process rights. Petitioner appeals and seeks review by this Court. Finally, the Sixth Circuit erroneously upheld the dismissal of Petitioner's **deprivation of property** rights for the loss of the items in his car which were never returned to him after the illegal search and seizure. Petitioner appeals and seeks review by this Court.

I. THIS COURT MUST REVIEW THE SIXTH CIRCUIT'S FAILURE TO PROTECT INNOCENT CITIZENS FROM UNREASONABLE SEARCHES. THE SEARCH OF PETITIONER'S VEHICLE DURING THE INITIAL STOP WENT BEYOND THAT PERMISSIBLE UNDER *TERRY*.

This case does not involve the suppression of an item found during a search. There is no criminal matter pending. This case is about the right to be free from unreasonable police intrusion and abuse of authority by a vindictive eBay seller and his buddies on the police force. Petitioner lost time, property, money and dignity. The Constitution should protect him. Petitioner does not agree he should have been stopped at all; but for purposes of the legal argument, he will not object to the stop or the initial questions.

Petitioner informed Officer Dickow he had a rifle in his vehicle when he was stopped. Whether the stop and subsequent arrest were legal or not, Petitioner does not object to the search of his vehicle for the weapon he identified as being in his car. "During an investigative stop, a police officer may search an automobile's passenger compartment, "limited to those areas in which a weapon may be placed or hidden," so long as he reasonably believes "the suspect is dangerous and . . . may gain immediate control of weapons." ***Michigan v. Long***, 463 U.S. 1032, 1049 (1983). But, when the search went beyond looking for the rifle identified by Petitioner to leafing through papers, opening boxes, and looking for evidence of a crime, it was no longer valid. ***Minnesota v. Dickerson***, 508 U.S. 366 (1993).

Petitioner had been asked for his license and registration. He was also asked to step outside his car. He was

then removed to the back of his car and asked to stand there while Office Dickow conferred with Seldon Scott. Petitioner was asked if he had any weapons. He was then handcuffed and taken to Officer Dickow's cruiser and detained while Officer Dickow, Scott, and Officer Mefford all three searched Petitioner's car. They removed the rifle, and looked through boxes and papers, conferred with each other, came back and talked with Petitioner. The three of them removed items from the car and, Deputy Dickow informed Petitioner he was then "under arrest." Petitioner was taken to jail while the other two remained behind in his vehicle.

The laws on search and seizure were defined and settled over 25 years ago in ***Michigan v. Long*** and ***Terry v. Ohio***, 392 U.S. 1 (1968) which arguably permitted Officer Dickow to "briefly" stop Petitioner to question him based upon a report of "suspicious" behavior; but which did not permit the type of conduct engaged in thereafter. A "brief investigative stop" and "protective search" is permissible; not a witch hunt of the nature engaged in here. Clearly Officer Dickow, Officer Mefford and Scott (in his role as an officer himself, joining in the search of the vehicle) over-stepped the bounds of the "strictly circumscribed" search for weapons allowed under ***Terry***. "[T]his Court rightly has been sensitive to the danger . . . that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will." ***Texas v. Brown***, 460 U.S. 730, 748 (1983). See also ***Minnesota v. Dickerson***, 508 U.S. 366 (1993), ***Arizona v. Hicks***, 480 U.S. 321 (1987). This is especially true in the Sixth Circuit where officers are given permission to stop vehicles for any infraction, no matter how slight. ***United States v. Ferguson***, 8 F.3d 385

(6th Cir. 1993). The Sixth Circuit must be vigilant to see that the extensive authority to stop vehicles is not abused by carrying out searches that are not authorized. "The rationale behind our decision in ***Ferguson*** was not to authorize 'fishing expeditions,' no matter how well-intentioned, by police agencies.... Since we have extended this authority to the broadest extent possible, however, we have a duty to see that the authority is not abused." ***United States v. Mesa***, 62 F.3d 159, 162 (6th Cir. 1995).

Because Respondents violated a clearly established constitutional right, they are not entitled to claim the protection of qualified immunity. The rights at issue were clearly established. It has long been held that individuals have a right to be free from unreasonable searches and seizures and the search of Petitioner's vehicle beyond what was necessary to locate and confiscate the weapon, while he was retrained in the cruiser without probable cause, was clearly a violation of his constitutional rights. Lastly, the third prong of the analysis requires a showing that Respondents actions were objectively unreasonable in light of the clearly established constitutional rights. ***Feathers v. Aey, supra*** and ***Radvansky v. City of Olmsted Falls, supra***. Based upon the facts as alleged, Petitioner has stated sufficient facts to demonstrate Respondents' conduct was unreasonable in light of the clearly established rights of Petitioner. The two Officers and Scott had no business searching through papers and boxes in Petitioner's vehicle; nor did they have the right to hold him against his will and without reason. The Sixth Circuit simply says the search was constitutional because there was a weapon in the car. (Apx. p. 10). There is absolutely no analysis of the law concerning how far the

search can go once the weapon is located. The Sixth Circuit's Opinion clearly infringes individual personal freedoms in violation of Fourth Amendment guarantees.

II. THE DETENTION OF PETITIONER DURING THE SEARCH WAS ILLEGAL

Respondents violated Petitioner's constitutional rights by detaining him handcuffed in the back of the police cruiser while they illegally searched his car. As stated previously, ***Terry v. Ohio*** and ***United States v. Ferguson*** permit a "brief investigatory stop." But, a brief stop to ask questions does not permit the Petitioner to be handcuffed and put in the back of a police cruiser and held against his will. Petitioner stopped at the Scotts' house to return property he purchased over the internet. He was there for only a few minutes and left almost immediately. Scott called the police and followed Petitioner to the highway. When Officer Dickow pulled Petitioner over, Petitioner cooperated and gave him his license and registration and immediately exited his vehicle. Under these circumstances, detaining Petitioner in the back of a police cruiser was not warranted and was unreasonable.

In the context of a ***Terry*** stop, "we see no additional justification that would warrant extending ***Pennsylvania v. Mimms***, 434 U.S. 106 (1977) to permit officers to detain all motorists or any individual in the course of a ***Terry*** stop, in the back of a police car, without circumstances that warrant the additional intrusion. While standing alongside one's car during a traffic stop is only a minor inconvenience and 'not a serious intrusion on the sanctity of the person,' . . . we think detention in the back of a police car involves the same, if not more 'serious intrusion

on the sanctity of the person, which may inflict great indignity, and arouse strong resentment, and it is not to be undertaken lightly'." ***Bennett v. City of Eastpointe***, 410 F.3d 810, 840 (6th Cir. 2005), *citing* ***Terry***, 392 U.S. at 17. *See also* ***Pennsylvania v. Mimms, supra***. ("The touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.").

There are no facts in the record to support a reasonable belief that Respondents had a right to place Petitioner in handcuffs in the back of the police cruiser while searching his car for evidence of a crime. Respondents were conspiring to find evidence to hold Petitioner long enough to trump up charges against him and hold him overnight. The Sixth Circuit erred in dismissing Petitioner's claim against Respondents because they are not protected by qualified immunity under these circumstances. ***Bennett v. City of Eastpoint, supra***. The Sixth Circuit utterly failed to address this issue.

III. THE SEIZURE AND THEFT OF PETITIONER'S PROPERTY AMOUNTS TO UNLAWFUL DEPRIVATION OF PROPERTY

All parties can agree the tumblers which were the subject of the original internet transaction were not returned to Petitioner. All parties can also agree the Department of Defense manuals taken from Petitioner's car were sent to The Department of the Army and were never returned to him. Countless other items which Petitioner did not inventory before leaving to travel to Kentucky are now missing from his vehicle; but the Respondents claim he cannot prove items were taken from

his vehicle and not returned. The true fact is, at least several items are already proven missing. Petitioner can state a claim for deprivation of property in violation of his constitutional rights under the Fourth Amendment. Having met his burden, the Sixth Circuit erred in dismissing his claims for deprivation of property. The Sixth Circuit never analyzed the law on the deprivation issue, finding Petitioner did not account for the items in his vehicle prior to his trip. The Sixth Circuit erred in failing to recognize Petitioner had met his burden of proof. The record is clear. Items were taken and not returned. (Apx. pp. 39-40).

Seizures of property require probable cause. ***United States v. Place***, 462 U.S. 696, 701 (1983). During a ***Terry*** stop, a brief seizure of property may be permissible if it is minimally intrusive and meets the test. ***Farm Labor Org. Comm. v. Ohio State Highway Patrol***, 308 F.3d 523, 543-44 (6th Cir. 2002).

"This ***Terry***-like inquiry for determining whether a seizure based upon less than probable cause is constitutional involves two steps. 'First, the court must determine whether the detaining officer has a reasonable and articulable suspicion that the property he wishes to seize is connected with criminal activity,' . . . and 'second, the scope of the seizure must be reasonable, both in duration and in intrusiveness' . . . As for the second prong, this Court has stated that to determine whether 'there is reasonable suspicion, the Court must then ascertain whether the detention is reasonable, that is, (1) was it sufficiently limited in time, and (2) were the investigative means used the least intrusive means reasonably available'." ***Bennett v. Eastpointe, supra*** at 825. There was absolutely no reason to seize Petitioner's vehicle or its contents. It was

absolutely unreasonable to detain Petitioner while "fishing" through his belongings and absolutely an unconstitutional seizure of his property to impound, search and take belongings from Petitioner's vehicle.

Under these facts, it was objectively unreasonable for Respondents to seize and detain Petitioner's property. Therefore, Respondents are not entitled to qualified immunity as a matter of law on this or any of their claims. See ***Sample v. Bailey***, 409 F.3d 689 (6th Cir. 2005).

IV. SCOTT IS LIABLE UNDER SECTION 1983 BECAUSE HE WAS ACTING UNDER COLOR OF STATE LAW

Seldon Scott identified himself as an officer in his correspondence to Petitioner. He admitted in testimony he verbally identified himself as a police officer. He referred to his vehicle as a cruiser. He followed Petitioner to the highway and remained in pursuit until Officer Dickow pulled Petitioner over. Scott then pulled over and joined Officer Dickow and conferred with him. Scott joined in the search of Petitioner's vehicle. Scott seized some of Petitioner's property. Scott called Petitioner's employer and the Department of Defense to report his arrest. Scott undertook participation in functions generally relegated to the police, as state actors. As such, Scott became a state actor, liable to Petitioner under Section 1983. ***Romanski v. Detroit Entertainment, L.L.C.***, 265 F. Supp. 2d 835 (E.D. Mich. 2003).

Section 1983 provides: "Every person who, under color of any statute, . . . subjects or causes to be subjected any citizen. . . . To the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws,

shall be liable to the party injured in an action at law . . . " State action may be found if a private person, such as Scott, exercised powers that are traditionally reserved to the State. See ***Chapman v. The Higbee Co.***, 319 F.3d 825 (6th Cir. 2003). "The United States Supreme Court has never determined whether a private security guard who is cloaked with the authority of a police officer is a state actor performing a public function that is traditionally reserved to the state." ***Romanski*** at 841. Yet, a number of federal courts have held a private individual is a state actor when vested with the authority of a police officer. ***Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.***, 184 F.3d 623 (7th Cir. 1999); ***Henderson v. Fisher***, 631 F.2d 1115 (3d Cir. 1980); ***Rojas v. Alexander's Dept. Store, Inc.***, 554 F. Supp. 856 (E.D.N.Y. 1986).

Scott participated in and acted alongside the police in this search and seizure. He engaged in police activities and was vested with the authority of a state actor. Scott is liable to Rothhaupt under Section 1983 because he acted under color of state law to deprive Rothhaupt of his right to be free from unreasonable search and seizure of his person and property. Scott, and the state police, acting in concert should be held jointly and severally liable and the Sixth Circuit opinion should be reversed as to the search and detention of Rothhaupt without probable cause or reasonable suspicion.

CONCLUSION

The petition for a writ of certiorari should be granted, and this Court should vacate the portions of the Sixth Circuit Opinion dismissing Petitioners federal and state law claims against Respondents.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JAY HOWARD ROTHHAUPT, Plaintiff-Appellant, v. CHARLIE MAIDEN, JR., Individually and in his official capacity as Carroll County Sheriff; RON WAYNE DICKOW, Individually and Deputy Carroll County Sheriff; SELDON SCOTT, Individually and in his official capacity as Special Deputy, Director of Public Safety; PHYLLIS SCOTT, Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Before: RYAN, MOORE, and COOK, Circuit Judges.

COOK, Circuit Judge. Jay Rothhaupt appeals the district court's grant of summary judgment for Defendants-Appellees on his federal and state-law claims arising out of his arrest by Defendant-Appellee Ron Dickow. Upon review, we reverse the district court's grant of qualified immunity to Dickow with respect to the arrest, but affirm its judgment in all other respects.

I. Background

This case begins with a sale through the auction website eBay. Rothhaupt, who lives in Colorado, purchased four Pfaltzgraff Heritage tumblers on eBay from Kentucky residents Seldon and Phyllis Scott for $59.00. Upon receiving the tumblers, Rothhaupt noticed flaws not mentioned in their eBay description. He complained to the Scotts via e-mail, and both sides exchanged e-mails over several days to resolve the dispute. Rothhaupt remained unsatisfied, however, even after the Scotts offered a full refund plus return shipping costs.

Mr. Scott told Rothhaupt he felt harassed by the tone of Rothhaupt's e-mails, and suggested Rothhaupt call him to resolve the dispute. But Rothhaupt did not call. Instead, he continued sending e-mails, stating, for example: "Clearly there are additional things you can do to resolve the problem you've caused via your fraud, so your claim that you 'have done all that is possible' is false. Perhaps you're confusing the set of things you're *willing* to do with the set of things you *can* do." Rothhaupt also stated that he intended to file fraud reports with eBay and the United States Postal Service.

Scott, who served as a special deputy with the Carroll County, Kentucky, Sheriff's Department, shared some details of this dispute with his co-workers, including Deputy Ron Dickow. He also contacted other eBay sellers who reported similar experiences with Rothhaupt.

In September 2001, Rothhaupt drove from Colorado to Pennsylvania to visit his mother. He brought with him a rifle to practice target shooting at his mother's house, in preparation for an elk hunt later that year. He also

brought the tumblers, thinking he might hand-deliver them to the Scotts in Kentucky if time permitted.

On September 21, 2001, Rothhaupt called the Scotts' house, and Mrs. Scott answered. Rothhaupt did not identify himself, but told her he had a delivery and wanted to make sure someone would be there to receive it. Mrs. Scott asked where the package was from, and Rothhaupt told her it was from Colorado. She then asked Rothhaupt to wait, and said her husband would talk to him. But Rothhaupt hung up because he had the information he wanted: the Rothhaupts were home.

A few minutes later, Rothhaupt arrived at the Scotts' house and approached the door, carrying an open box and a clipboard with the printed-out e-mail exchanges. He told Mr. Scott the package was "an Ebay return from Jay Rothhaupt in Colorado Springs, [and] the COD is $100.00." Mr. Scott asked Rothhaupt who he was with. After some confusion about what that question meant, Rothhaupt asked, "Do you want to know my identity?" After Scott said yes, Rothhaupt declared, "I'm Jay Rothhaupt."

Scott then turned to his wife and told her to phone the police. The parties dispute what happened next. Rothhaupt claims Scott stated, "I'm a law enforcement officer, stay there." Rothhaupt claims he then asked if Scott was refusing the shipment, and after Scott said yes, he returned to his car. Scott, however, alleges that after Rothhaupt gave his name, Scott repeatedly ordered him to leave the property, and Rothhaupt did so within about one minute, after several requests.

As Rothhaupt drove away from the Scotts' house, Mr. Scott began following him in his car. Soon Dickow, responding to Mrs. Scott's police call, stopped Rothhaupt's

car on Interstate 71. Scott, still following Rothhaupt, pulled over behind the other two cars. Dickow spoke to Scott before speaking with Rothhaupt. Scott told Dickow that Rothhaupt had called the house without identifying himself to find out if anyone was home, arrived at the Scotts' house uninvited, and then refused to leave when ordered to do so.

Dickow then approached Rothhaupt's car and asked Rothhaupt if he had been to the Scotts' house. Rothhaupt admitted he had, but claimed he had written permission to be there. Dickow asked to see the tumblers, which were in the back of the car, but Rothhaupt denied Dickow permission to enter the car. Dickow ordered Rothhaupt out of the car and frisked him, finding no weapons. Dickow then asked Rothhaupt if he had ever been arrested or if he had any illegal drugs or firearms in the vehicle. Rothhaupt denied having been arrested or possessing drugs, but said he had a rifle in the footwell of the back seat. He explained that he had the rifle because he was coming from Pennsylvania, where he had used it for target practice.

Dickow walked back to the police car and conferred with Scott again. Scott repeated his claim that Rothhaupt had refused to leave the Scotts' property when ordered to do so. Dickow then walked back to Rothhaupt and placed him under arrest, handcuffing him and putting him in the back of the police car. Dickow then searched Rothhaupt's car, where he found the rifle, among other things. Scott and another deputy who arrived, Medford, also helped search. According to Rothhaupt, Scott told Medford, "This is the guy I told you about at the station who's been doing this stuff to Ebayers and threatened me with fraud."

Dickow eventually charged Rothhaupt with second-degree stalking, harassing communications, theft by deception, and third-degree criminal trespass. While Rothhaupt was held in the county jail and his car was impounded, Dickow applied for and obtained a search warrant. Searching the car again, he found several medications in a black film container, including caffeine tablets, aspirin, and 800 milligrams of ibuprofen, which he believed were prescription medication. Rothhaupt posted bond and was released from the detention center the next day. Having found the ibuprofen during the search, Dickow arrested Rothhaupt again as he left the detention center for possessing prescription medication not in its original container. Rothhaupt was released shortly thereafter without posting additional bond.

The prescription-drug and theft-by-deception charges were eventually dropped, but Rothhaupt was tried on the other three charges. The trial judge dismissed the stalking charge at the close of the prosecution's case-in-chief, and the jury acquitted Rothhaupt on the other two charges.

Rothhaupt then brought this suit under 42 U.S.C. § 1983 in the district court against Sheriff Charlie Maiden, Dickow, and the Scotts, alleging violations of his constitutional rights and various pendent state-law claims. After a brief discovery period, the district court granted summary judgment for all defendants. It dismissed the claims against Phyllis Scott because she did not act under color of state law. It dismissed the claim against Maiden in his individual capacity because he was not personally involved in the incident. It dismissed the claims against defendants in their official capacities, because Rothhaupt had not demonstrated they were acting pursuant to a municipal custom or exhibited deliberate indifference to his constitutional

rights. It held that Scott and Dickow had not violated Rothhaupt's constitutional rights – and were therefore entitled to qualified immunity – because they had reasonable suspicion to stop him and probable cause to arrest him, and the search of his car was incident to the arrest. Finally, after dismissing the federal claims, the court discontinued supplemental jurisdiction over the pendent state-law claims.

We review the district court's grant of summary judgment under the familiar *de novo* standard. *Boone v. Spurgess*, 385 F.3d 923, 927 (6th Cir. 2004). And in determining whether the defendants enjoy qualified immunity, we consider: (1) "whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiffs show that a constitutional violation has occurred;" (2) "whether the violation involved a clearly established constitutional right of which a reasonable person would have known;" and (3) "whether the plaintiff has offered sufficient evidence to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights." *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003) (internal citations and quotation marks omitted).

II. The Stop

We agree with the district court that Dickow and Scott are immune with respect to the initial stop, because it was constitutional. "[W]here a law enforcement officer lacks probable cause, but possesses a reasonable and articulable suspicion that a person has been involved in criminal activity, he may detain the suspect briefly to investigate the suspicious circumstances." *United States v. Bentley*, 29

F.3d 1073, 1075 (6th Cir. 1994) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

Here, a dispatcher told Dickow that Mrs. Scott had reported a suspicious person who refused to leave her property. Dickow knew the car he pulled over belonged to that suspicious person. Thus it was reasonable for Dickow to stop Rothhaupt. Rothhaupt argues that the stop was unjustified because his alleged crimes did not occur in Dickow's presence. But the Constitution imposes no such requirement. *See Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995) (Kentucky's requirement that an officer personally witness a misdemeanor before making an arrest does not affect Fourth Amendment analysis).

III. The Arrest

We disagree with the district court on the propriety of the arrest, because Dickow lacked probable cause. Under the Fourth Amendment, an officer "may not seize an individual except after establishing probable cause that the individual has committed, or is about to commit, a crime." *Williams ex rel. Allen v. Cambridge Bd. of Educ.*, 370 F.3d 630, 636 (6th Cir. 2004). Probable cause depends on "whether at that moment [of arrest,] the facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). This is typically a jury question, unless only one reasonable determination is possible. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 302 (6th Cir. 2005).

"[A] mere allegation [of criminal behavior], while possibly justifying a brief investigatory detention, is insufficient by itself to establish probable cause that a crime had been committed." *Id.* at 305. To establish probable cause in the face of such a naked allegation, an officer must investigate further and find objective factors to corroborate the claim. *See id.* at 308-09.

Here, at the moment of arrest, Dickow was faced with conflicting statements from Scott and Rothhaupt regarding whether Rothhaupt had permission to be on the Scotts' property – and he impermissibly relied on Scott's assertions without any further investigation. True, he knew Scott from the sheriff's department and had heard him complain about an eBay customer who "annoyed" him. But this did not suffice to elevate his reasonable suspicion to probable cause – especially in light of Scott's personal interest in the matter, both because Scott was the alleged trespass victim and because of Scott's ongoing dispute with Rothhaupt. *See id.* at 309 (claims of "an interested party involved in a contentious dispute . . . should be viewed in a skeptical light"). And, importantly, Dickow failed to properly investigate the matter by not even asking to see the written permission Rothhaupt claimed to have.[1] Nor, apparently, did he ask Rothhaupt for a detailed description of the events on the Scotts' property. Rothhaupt left the Scotts'

[1] Judge Ryan argues in dissent that "[n]o reasonable trier of fact could conclude . . . that Rothhaupt had written permission to come onto the Scotts' property." The focus, however, is on whether Dickow possessed reliable reasons for finding probable cause at the time of Rothhaupt's arrest. Dickow acted on Scott's information without evaluating Rothhaupt's "written permission" claim. We agree that if he had asked and investigated the matter further, he might have established probable cause. But the record lacks that requisite investigation.

property within minutes of being asked, even according to Scott

Considering all this in the light most favorable to Rothhaupt, as we must, we cannot say the evidence compels a conclusion that probable cause supported Rothhaupt's arrest for trespass, stalking, harassing communications, or theft by deception.[2] Thus, a reasonable jury could find that Dickow violated Rothhaupt's Fourth Amendment right, and we must next consider in assessing Dickow's qualified immunity entitlement, whether the right was clearly established, and whether Dickow's actions were objectively unreasonable in light of that right. *Feathers*, 319 F.3d at 848.

Without question, it was clearly established at the time of Rothhaupt's arrest that an arrest without probable cause was unconstitutional. *See Radvansky*, 395 F.3d at 310. In light of that right, and considering all facts in the light most favorable to Rothhaupt, Dickow's actions – making an arrest

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[2] Judge Ryan argues Dickow had probable cause to arrest for stalking and harassing communications. We find probable cause even weaker for these two offenses. Dickow does not even argue on appeal that he had probable cause to arrest for stalking – presumably because the record reveals no allegation that Rothhaupt explicitly or implicitly threatened sexual contact, physical injury, or death, as Kentucky's stalking statute requires. *See* Ky. Rev. Stat. Ann. § 508.150(1).

As for "harassing communications," these must serve "no purpose of legitimate communication." Ky. Rev. Stat. Ann. § 525.080(1). But here Dickow knew Rothhaupt's communications pertained to both his eBay dispute and to determining whether the Rothhaupts were home so he could make a delivery – surely matters of "legitimate communication." It also appears that Dickow's knowledge of these communications, like his knowledge of the trespass, may have come entirely from Mr. Scott. (Dickow claims to have asked Rothhaupt about the phone call, but cannot recall Rothhaupt's response, and Rothhaupt's account of their encounter does not include any discussion of the phone call.)

for a misdemeanor trespass and other non-violent offenses, based solely upon an interested party's allegations – were unreasonable. *See id.* We therefore reverse the district court's grant of qualified immunity for Dickow and remand the Fourth Amendment claim regarding Rothhaupt's arrest.

IV. The Search

The district court dismissed Rothhaupt's claim arising out of the search of his car after his arrest. We affirm because the search did not violate a clearly established constitutional right.

During an investigative stop, a police officer may search an automobile's passenger compartment, "limited to those areas in which a weapon may be placed or hidden," so long as he reasonably believes "the suspect is dangerous and . . . may gain immediate control of weapons." *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). Here, Rothhaupt admitted to having a rifle in his car's passenger compartment. So although Dickow might have lacked probable cause to arrest Rothhaupt, he nonetheless could have searched the car for weapons as part of the *Terry* stop. Rothhaupt thus fails to allege a constitutional-rights violation, and we therefore affirm the district court's grant of qualified immunity with respect to the search.

V. Individual-Capacity Claims

We affirm the district court's dismissal of the claims against Mr. Scott and Sheriff Maiden in their individual capacities. An officer who did not participate in an arrest cannot be held liable for constitutional violations arising out of that arrest. *Radvansky*, 395 F.3d at 311. Here, Scott

did not participate in Rothhaupt's arrest – he merely complained to Dickow, who made the arrest. And we have no evidence that Sheriff Maiden played any role in these events, either directly or indirectly by instructing Dickow.

VI. Official-Capacity Claims

We likewise affirm the district court's dismissal of the claims against Appellees in their official capacities. "Official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (internal quotation marks omitted). An official-capacity claim "is *not* a [claim] against the official personally, for the real party in interest is the entity." *Id.* at 166, 105 S.Ct. 3099. To establish liability in such a claim, the plaintiff must demonstrate that "the entity itself is a moving force behind the deprivation; thus, in an official-capacity suit the entity's policy or custom must have played a part in the violation of federal law." *Id.* (internal citations and quotation marks omitted).

In support of his official-capacity claim, Rothhaupt argues that his alleged rights violations resulted from Carroll County's failure to train its police officers. To succeed on this failure-to-train claim, Rothhaupt "must show prior instances of unconstitutional conduct demonstrating that the County has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury." *Fisher v. Harden*, 398 F.3d 837, 849 (6th Cir. 2005). Rothhaupt fails to provide any such evidence – and the claim therefore fails.

VII. Due Process

Finally, we affirm the district court's dismissal of Rothhaupt's due-process claims.

Rothhaupt argues the Appellees deprived him of property without due process by keeping "extensive amounts" of his property seized during the search of his vehicle, including "hundreds of documents" and "several heirlooms." None of these items, however, is listed on the inventory of objects seized during the vehicle search. And while their absence from the list does not prove that police did not seize them, Rothhaupt offers no evidence that the items were ever actually in the vehicle.

The claim also fails because Rothhaupt does not show that existing state remedies are inadequate. "If satisfactory state procedures are provided in a procedural due process case, then no constitutional deprivation has occurred despite the injury." *Jefferson v. Jefferson County Pub. Sch. Sys.*, 360 F.3d 583, 587-88 (6th Cir. 2004); *see also Mitchell v. Fankhauser*, 375 F.3d 477, 481-84 (6th Cir. 2004) (plaintiff must plead inadequacy of state remedies where alleged due-process violation involved "a random or unauthorized act"). That is, Rothhaupt cannot claim a denial of due process without explaining why the existing process is inadequate – he "must prove the inadequacy of state remedies as an element of [his] constitutional tort." *Jefferson*, 360 F.3d at 588. Here, Rothhaupt fails to explain why a state tort remedy for conversion would not suffice to address his claim. *See Fox v. Van Oosterum*, 176 F.3d 342, 349 (6th Cir. 1999). The federal claim therefore fails.

VIII. Conclusion

For the foregoing reasons, we reverse the district court's grant of qualified immunity for Dickow on Rothhaupt's unlawful-arrest claim, and remand that claim to the district court for further proceedings. We affirm, however, dismissal of all the other claims.

RYAN, Circuit Judge, dissenting. My colleagues conclude that the district court's grant of summary judgment should be reversed because Dickow did not have probable cause to arrest Rothhaupt for the crimes with which he was charged. Because I believe Dickow had probable cause to arrest Rothhaupt, I respectfully dissent.

My colleagues reason that, given the conflicting statements as to whether Rothhaupt had permission to remain on the Scotts' property, Dickow impermissibly relied on Seldon Scott's statement alone without any further investigation, and thus did not have probable cause to arrest Rothhaupt on any grounds. During the traffic stop, Scott informed Dickow that he had "told [Rothhaupt] to leave," to which Rothhaupt responded: "No, you didn't, you said to stay." Rothhaupt also told Dickow that he had written permission to be on the Scotts' property, but there is no genuine issue of material fact as to whether Rothhaupt had such permission. At the time of his arrest, Rothhaupt had in his possession a printout of the e-mail exchanges between himself and Scott concerning the eBay sale of the tumblers. Apparently, Rothhaupt interpreted Scott's offer "to pay return shipping" as an invitation to Rothhaupt to travel from Colorado to the Scotts' home in Kentucky to personally hand deliver the tumblers and demand cash on delivery. No reasonable

trier of fact could conclude from this language or anything else in the record that Rothhaupt had written permission to come onto the Scotts' property, nor would it have undermined Scott's allegation of criminal trespass had Dickow read this document.

Given the evidence above, it is apparent that the facts are in dispute as to whether Scott ordered Rothhaupt to leave his property. Those conflicting statements, however, have real significance *only* for the criminal trespass charge. Dickow testified, and his citation confirms, that he initially arrested Rothhaupt, not only for criminal trespass, but also for harassing communications, stalking in the second degree, and theft by deception. My colleagues do not explain why the dispute as to whether Scott ordered Rothhaupt to leave his property, the resolution of which was necessary to determine whether Rothhaupt had committed a criminal trespass, necessarily eliminated probable cause for the other crimes for which Rothhaupt was arrested and charged. "[W]here no probable cause exists to arrest a plaintiff for a particular crime, but . . . probable cause exists to arrest that plaintiff for a related offense, the plaintiff cannot prevail in a suit alleging wrongful arrest brought pursuant to 42 U.S.C. § 1983." *Voyticky v. Village of Timberlake*, ___ F.3d ___, 2005 WL 1500900 at *4 (6th Cir. 2005). Indeed, none of the other charged crimes require evidence that an arrestee remained unlawfully on another's property.

Even assuming Dickow did not have probable cause to arrest Rothhaupt for criminal trespass, there is sufficient evidence from which a reasonable officer could conclude that there was probable cause to arrest Rothhaupt for stalking in the second degree. Under Kentucky law, stalking is "an intentional course of conduct . . . [d]irected

at a specific person or persons . . . [w]hich seriously alarms, annoys, intimidates, or harasses the person or persons[,] and [w]hich serves no legitimate purpose." Kentucky Rev. Stat. Ann. § 508.130(1)(a). "A person is guilty of stalking in the second degree when he intentionally . . . [s]talks another person[] and [m]akes an explicit or implicit threat with the intent to place that person in reasonable fear of . . . [s]exual contact . . . [,] . . . [p]hysical injury[,] or [d]eath." Kentucky Rev. Stat. Ann. § 508.150(1).

In his citation, Dickow briefly explained why he arrested Rothhaupt for stalking in the second degree: "Subject drove from Colorado to Kentucky to deliver [a] package, would not [identify] self or contents in package." Dickow also testified regarding his reasons for arresting Rothhaupt for stalking in the second degree:

> I was notified by Seldon Scott, deputy, prior to Mr. Rothhaupt's arrest – approximately six weeks – stating that he was involved with a transaction through eBay with Mr. Rothhaupt.
>
> He had come to me and was concerned about what was going on. It did raise his level of safety – that he had tried to work it out and finally he did state that through speaking and also e-mails that he didn't want no more communication with Mr. Rothhaupt. After that, the traffic stop, him showing up at the door, is what I classified as stalking.

Thus, Dickow was aware of the bizarre e-mail exchange arising from the eBay sale in which Scott ordered Rothhaupt to "quit harassing us." He knew that the Scotts were concerned for their "safety." Scott told Dickow at work that he was "alarmed" and "annoyed" by Rothhaupt's behavior. Dickow believed that Rothhaupt's uninvited and

unanticipated presence at the Scotts' home in Kentucky, hundreds of miles away from Rothhaupt's home in Colorado, was strange, stalking-like behavior. Dickow knew that, upon arriving at the Scotts' home, Rothhaupt refused to identify himself or the contents of the package until he was asked several times to do so by Scott. At the traffic stop, Dickow learned from Scott that Rothhaupt had harassed other eBay users. A reasonable officer could legitimately infer from these facts that Rothhaupt's conduct was actually motivated by an intent to alarm and intimidate the Scotts, notwithstanding any legitimate purpose Rothhaupt claimed to have for his actions.

Dickow also had probable cause to arrest Rothhaupt for harassing communications. "A person is guilty of harassing communications when with intent to harass, annoy or alarm another person he ... [c]ommunicates with a person ... by telephone, telegraph, mail or any other form of written communication in a manner which causes annoyance or alarm and serves no purpose of legitimate communication[.]" Kentucky Rev. Stat. Ann. § 525.080(1)(a). In his citation, Dickow noted that the "subject telephoned deputy would not [identify] self, then hung up on him, [and a] few minutes later shows up [at] residence." Dickow testified that, prior to the arrest, Scott informed him of the details underlying the harassing communications charge: "Basically, he explained to me that ... one of them received a phone call approximately five minutes prior to this Mr. Rothhaupt showing up at his residence. The phone call was made. The gentleman wouldn't identify hisself [sic]. It alarmed ... Phyllis [Scott]. She was concerned about it." Rothhaupt's phone call was sufficiently alarming that, after he hung up on

her, Phyllis Scott went around the house locking all the doors.

To support their conclusion that Dickow lacked probable cause to arrest Rothhaupt, my colleagues rely primarily on the case of *Radvansky v. City of Olmsted Falls*, 395 F.3d 291 (6th Cir. 2005). In *Radvansky*, the plaintiff was arrested by the defendant police officers for burglary after the plaintiff broke into his own leased residence. *Id.* at 299-301. Because the plaintiff had paid most of his rent for the month, the court noted that the plaintiff was a current tenant, with a right to enter and occupy the residence, and thus could not be found liable for burglary. *Id.* at 304. The court rejected the argument that the defendant police officers had probable cause to arrest the plaintiff for a number of related but uncharged crimes, including breaking and entering, criminal trespass, and criminal mischief. *Id.* at 307 n.12. The court explained that, like the charged crime of burglary, the other crimes all required a showing of either criminal trespass or unprivileged activity. *Id.* The court thus concluded that, because "the police should have known [the plaintiff] was a current tenant entitled to 'custody and control' of the . . . residence, whether there was probable cause to arrest [the plaintiff] for any of these other crimes is a disputed material fact as well." *Id.*

No similar conclusion can be reached here. While the facts may be in dispute as to whether Rothhaupt "remain[ed] unlawfully in or upon premises," Kentucky Rev. Stat. Ann. § 511.080(1), and thus whether Dickow had probable cause to arrest Rothhaupt for criminal trespass, the other crimes for which Rothhaupt was arrested – harassing communications, stalking in the second degree, and theft by deception – do not require evidence of a trespass to establish probable cause. It is of no significance

that Rothhaupt was never convicted for any of the above offenses because "[t]he existence of probable cause to arrest . . . does not depend on actual criminal liability [.]" *Radvansky*, 395 F.3d at 304. Rather, whether Rothhaupt's arrest was constitutionally valid depends upon "whether, at the moment the arrest was made, . . . the facts and circumstances within [Dickow's] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [Rothhaupt] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

Because I believe Dickow had probable cause to arrest Rothhaupt, at the very least, for harassing communications and stalking in the second degree, I respectfully dissent.

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

JAY HOWARD ROTHHAUPT, Plaintiff, v. CHARLIE MAIDEN, *et al.*, Defendants.	Civil Action No. 02-84-JMH **MEMORANDUM OPINION & ORDER** (Filed Jun. 21, 2004)

* * *

This action is before the Court on Defendants Charlie Maiden, Jr., Ron Wayne Dickow, and Seldon Scott's motion for summary judgment [Record Nos. 20]. Plaintiff has responded [Record No. 25], and Defendants have replied in support of their motion for summary judgment [Record No. 32]. Defendants Phyllis and Seldon Scott have also filed a motion for summary judgment [Record No. 23], to which Plaintiff has responded [Record No. 30] and in support of which Defendants Phyllis and Seldon Scott have replied [Record No. 29]. These matters are now ripe for a decision.

BACKGROUND

Defendants Seldon and Phyllis Scott, sell collectibles and antiques under the name Hilltop Collectibles through eBay, a website that hosts online auctions. In July 2001, the Scotts placed four Pfaltzgraff Heritage tumblers up for auction on eBay in a listing that included a picture of the items and a brief description indicating that one of the tumblers had a "manufacture flaw in the glace on the rim." [Deft. Maiden, Dickow, and Seldon Scott's Memo. Supp.

Motion for Summary Judgment, Exh. 1.] Jay Rothhaupt, a collector who lives in Colorado Springs, participated in this auction and submitted the winning bid of $59.00 for the tumblers.

After Rothhaupt received the tumblers, he sent an electronic mail message to the Scotts, claiming that the tumblers had a variety of additional flaws not reported on the website in excruciating detail. He requested that the Scotts "let [him] know of [their] position regarding the obvious, undescribed flaws." The Scotts and Rothhaupt exchanged several messages in an attempt to resolve the dispute through July 31, 2001. Phyllis Seldon initially offered Rothhaupt a full refund without questioning his assertions about the defects in the tumblers, explaining " . . . we do this as a hobby and we try to describe the items to the best of our ability and do not try to deceive anyone." [*Id.*, Exh. 4.]

Rothhaupt communicated that a full refund would not be acceptable since he objected to paying the cost of postage to return the item. He also stated, as follows:

> . . . a refund does not satisfy your contractual requirement for the subject auction. . . . If a buyer were satisfied having the money instead of having the items described in the auction, the buyer wouldn't have bid on the auction. Please let me know if you have any alternatives – I'm optimistic this problem can be resolved.

[*Id.*, Exh. 5.] Mr. Scott again offered Rothhaupt a full refund upon return of the tumblers. Rothhaupt responded by declining the full refund and accused the Scotts of fraud, threatening to file an eBay fraud report. Mr. Scott offered, for the third time, to provide Rothhaupt a full

refund, offered to pay return shipping charges, and invited Rothhaupt to telephone him at his expense so that they could discuss the matter, indicating that the Scotts felt unnecessarily harassed by the tone and suggestions contained in Rothhaupt's communications when they had done all that possible to address Rothhaupt's dissatisfaction with the tumblers. Rothhaupt responded:

> I'll start by identifying your falsehoods . . . clearly there are additional things you can do to resolve the problem you've caused via your fraud, so your claim that you 'have done all that is possible' is false. Perhaps you're confusing the set of things you're 'willing' to do with the set of things you 'can' do.

[*Id.*, Exh. 9]. He advised them that he intended to file a complaint with PayPal, the website that facilitated his payment for the tumblers, as well as a fraud complaint with the United States Postal Service. While he states that Defendants cut off all lines of communication with him, it is clear that he did not send another message nor did he indicate whether he intended to keep or return the tumblers. After this exchange, Plaintiff visited his mother in Pennsylvania. During that time he engaged in target practice for an elk hunt in which he had been asked to participate in Colorado. As he traveled back to Colorado, he drove through Kentucky with the intention of hand-delivering the goods to Defendants.

In the meantime, Seldon Scott, a Special Deputy with the Carroll County Sheriff's Department, had communicated some of his difficulties with Rothhaupt to his co-workers. Specifically, he told Deputy Ron Dickow of his online transaction with Rothhaupt, Rothhaupt's unhappiness with the items, and the annoying and alarming

communications from Rothhaupt. Unnerved by and suspicious of Rothhaupt's accusations, the Scotts contacted other eBay users who had dealt with Rothhaupt to determine if others had the same experience. These individuals indicated similar experiences with Rothhaupt.

On Friday, September 21, 2001, Phyllis Scott answered the telephone at the Scotts' home in Carrollton, Kentucky. A male caller said that he had a package to deliver to 1712 Hilltop Drive, the Scotts' home, and that he was "not far away" and would be there "in just a few minutes." [Rothhaupt depo. at 115-16.] He inquired whether anyone would be home to accept the delivery but did not identify himself by name or affiliation and did not indicate what was in the package. When Phyllis Scott inquired about the package, the caller said that it was from Colorado. Phyllis Scott, not expecting a delivery, asked the caller to "hold on a minute" and turned to Seldon Scott to discuss the matter, but the caller abruptly hung up.

A few minutes later, a man dressed in gray pants and a polo shirt parked his car on the street in front of the Scotts' house and approached the house carrying an unsealed box. The man indicated to Seldon Scott, who was standing just inside the house with the front screen door slightly ajar, that he had a delivery for 1712 Hilltop Drive. Seldon Scott inquired about what the package was, and the man responded that he was Jay Rothhaupt with an eBay return. He asked for $100.00 as payment for a COD package. As Rothhaupt describes the scenario, Seldon Scott became angry and demanded to know who the Plaintiff "was with." Seldon Scott identified himself as a law enforcement officer and told the plaintiff to "stay right there." He declined the package, told Phyllis Scott to call

the police, and obtained Rothhaupt's license plate number. A dispatcher directed Dickow to respond to Phyllis Scott's call, telling him someone refused to leave the Scotts' property.

Dickow pursued Rothhaupt onto Interstate 71, signaling him to pull over. Seldon Scott, who had been following Rothhaupt, pulled in behind Dickow's cruiser. Dickow conferred with Seldon Scott who explained that Rothhaupt had called the Scott's home, would not identify himself, wanted to know whether anyone would be home, and hung up. He also explained that Rothhaupt had shown up at the Scotts' home and had refused to leave when Seldon Scott told him to do so.

Dickow approached Rothhaupt's vehicle and asked for his license and registration. During this exchange, Dickow asked Rothhaupt whether he had been at the Scotts' home. Rothhaupt admitted that he had been there, although he stated that he had written permission to be there. While speaking with Rothhaupt, he asked to see the tumblers in question that were located on the back seat. Rothhaupt denied the officer permission to enter his car. When Dickow yelled at Plaintiff to exit the car, Plaintiff complied. After Dickow patted Plaintiff down, finding nothing, he began questioning the Plaintiff. He inquired whether Plaintiff had any firearms or illegal drugs in the car. Plaintiff explained the presence of the rifle in his car and that it was located in the footwell of the rear seat.

After a brief conversation with Scott, in which Scott repeated that Rothhaupt had refused to leave the Scott's property when asked to do so, Dickow arrested Rothhaupt, applied handcuffs, and placed Plaintiff in the back of the cruiser. Dickow opened the car door and examined the

rifle, as he claims, to insure that it was not loaded. He noted military books and Department of Defense materials, which caused him alarm in light of terrorist attacks that had occurred a week earlier.

Plaintiff describes how Dickow began to search through the rifle case while Scott searched the car, too, and removed the box containing the tumblers. Another officer, Deputy Mefford, arrived on the scene and assisted Scott and Dickow as they searched through the personal papers in the vehicle.

Dickow charged Rothhaupt with violations of KRS 508.150 (stalking in the second degree), KRS 525.080 (harassing communications), KRS 514.040 (theft by deception), and KRS 511.080 (criminal trespass in the third degree). Dickow also applied for an [sic] obtained a search warrant based on the suspicious nature of some of the items seen in plain view in Rothhaupt's vehicle. He conducted a search of the vehicle while Rothhaupt was in the Carroll County Detention Center, seizing several military-related items, a pamphlet entitled "What to Do if stopped by Police," and multiple identification cards. In light of the alerts, warnings, and communications received by the Sheriff's Department in the aftermath of the September 11, 2001, terrorist attacks in New York City, Dickow contacted the U.S. Department of Defense. An agent for the DOD arrived and took possession of certain items, Dickow also found several medications, including Ibuprofen 800, that he believed to be prescription medications and which were not in their original containers.

Rothhaupt posted bond and was released from the detention center the following day. Having found the medications during the search of the vehicle, Dickow

arrested Rothhaupt as he left the detention center and charged him with a violation of KRS 218A.210, which requires certain prescription medications to be kept in their original containers. Rothhaupt was released shortly thereafter without posting further bond. This charge was subsequently dropped, but the remaining charges proceeded to trial. The judge dismissed the charges of stalking and theft by deception after the prosecution rested. The jury acquitted Rothhaupt of the remaining charges: trespassing and harassing communications.

On September 20, 2002, Rothhaupt brought this action against Maiden, Dickow, the Scotts, alleging violations of his rights under the Second, Fourth, Fifth, and Fourteenth Amendments.[1] He also asserts torts under, state law: assault, false arrest, false imprisonment, malicious prosecution, defamation, and tortious interference with business opportunity.

APPLICABLE STANDARD OF REVIEW

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." The moving party may discharge its burden by showing "that there is an absence

[1] Plaintiff's claims under the Fifth Amendment shall be dismissed as the due process protections afforded by the Fifth Amendment pertain only to actions taken by the federal government, not state or local governments as alleged in this matter. *See Bartkus v. Illinois*, 359 U.S. 121, 124 (1959); *Newsom v. Vanderbilt University*, 653 F.2d 1100, 1113 (6th Cir. 1981).

of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The nonmoving party, which in this case is the plaintiff, "cannot rest on [her] pleadings," and must show the Court that "there is a genuine issue for trial." *Hall v. Tollett*, 128 F.3d 418, 422 (6th Cir. 1997). In considering a motion for summary judgment the court must construe the facts in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

When the question is one of qualified immunity, however, the analysis is somewhat altered. In ruling on a motion for summary judgment based on the defense of qualified immunity, the existence of a disputed, material fact does not *necessarily* preclude summary judgment. Even if there is a material fact in dispute, summary judgment is appropriate if the Court finds that – viewing the facts in the light most favorable to the plaintiff – the plaintiff has failed to establish a violation of clearly established constitutional law. *Saucier v. Katz*, 533 U.S. 194 (2001); *Dickerson v. McClellan*, 101 F.3d 1151, 1158 (6th Cir. 1998).

DISCUSSION

I. 42 U.S.C. § 1983 CLAIMS

A. PHYLLIS SCOTT

In order to state a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate, in part, that a defendant acted under color of state law, 42 U.S.C. § 1983. In his response to Seldon and Phyllis Scott's motion for summary judgment, Rothhaupt concedes that Defendant Phyllis Scott did not act under color of state law and is not susceptible to liability under 42 U.S.C. § 1983. Accordingly, the federal

claims pending against Defendant Phyllis Scott shall be dismissed.

B. MAIDEN, DICKOW, AND SELDON SCOTT IN THEIR OFFICIAL CAPACITIES

"A suit against an individual in his official capacity is the equivalent of a suit against the governmental entity." *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994) (*citing Will v. Michigan Dept. of State Police*, 491 U.S. 58, 68 (1989)). As the Supreme Court has remarked:

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell v. Department of Social Services of City of New York, 436 U.S. 658, 694 (1978); *see also Kentucky v. Graham*, 473 U.S. 159, 167 (1985).

Thus, by his official capacity claims against Defendants Maiden, Dickow, and Seldon Scott under 42 U.S.C. § 1983, Rothhaupt asserts that he was injured by a failure on the part of Carroll County to adequately train its police officers. Certainly, under limited circumstances, a failure to train may form the basis for liability under § 1983, but "only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is

actionable under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

Deliberate indifference is indicated by failure "to provide adequate training in light of foreseeable consequences that could result from lack of instruction . . . [or] where the city fails to act in response to repeated complaints of constitutional violations by its officers. *Brown v. Shaner*, 172 F.3d 927, 931 (6th Cir. 1999). Mere proof that the officers were actually improperly trained is insufficient. *City of Canton*, 489 U.S. at 390-91. Rather, a plaintiff must point to a particular deficiency in the training of government employees. *Id.* Specifically, a plaintiff must show:

> . . . in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need . . . The focus must be on adequacy of the training program in relation to the tasks the particular officers must perform.

Id. at 390. This requires plaintiff to demonstrate what is "essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable . . . or would properly be characterized as substantially certain to result. *Hays v. Jefferson County, Kentucky*, 668 F.2d 869 (6th Cir. 1982).

Rothhaupt offers only the general allegation that Carroll County did not adequately train its officers and no evidence of any particular training deficiency or to support the argument that the need for more or different training

was so obvious that Carroll County officials could be said to be deliberately indifferent to the need.[2] Thus, Defendants Dickow, Maiden, and Seldon Scott, in their official capacities, are entitled to summary judgment because Plaintiff cannot establish that any official custom or policy was the moving force behind the alleged constitutional deprivations. Rothhaupt's claims against them in their official capacities pursuant to 42 U.S.C. § 1983 shall be dismissed.

C. MAIDEN IN HIS INDIVIDUAL CAPACITY FOR CLAIMS ARISING UNDER THE FOURTH AMENDMENT AND FOR DEFAMATION

To hold Maiden liable for his subordinate's conduct, Rothhaupt must "prove that [the supervising officer] did more than play a passive role in the alleged violation or showed mere tacit approval of the goings on." *Bass v.*

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[2] Further, the evidence indicates that in 1998 Defendant Dickow successfully completed basic training at the Kentucky Department of Criminal Justice, consisting of 640 hours of intensive class room training in areas including detention and arrest, searches, use of force, and other issues. He was also assigned, a field training officer for six to eight weeks and has attended further training sessions beginning in 1999.

With regard to Seldon Scott, the Court is not convinced that Plaintiff has demonstrated that he played a sufficient role in the stop, arrest, and seizure of property to support Plaintiff's claims. In any event, Rothhaupt focuses on Maidens deposition testimony that he did net recall that Defendant Seldon Scott had ever received any formal law enforcement training. Nonetheless, Defendants have demonstrated and Rothhaupt has not controverted that Seldon Scott was appointed a special deputy pursuant to KRS 70.045 to assist in general law enforcement and maintenance of public order. He was not generally expected to make arrests. Rather he was called upon on an as-needed basis to pick up witnesses and perform other limited duties collateral to police investigations. In light of his limited duties, Maiden did not undergo the same type of extensive training as Dickow and had limited training at the courthouse with special instructors.

Robinson, 167 F.3d 1041, 1048 (6th Cir. 1999), "Liability under this theory must be based upon more than a mere right to control employees and cannot be based upon simple negligence," *Id.* Maiden was not present during Plaintiff's arrest, did not participate in the search of Plaintiff's vehicle, did not initiate any investigation of Plaintiff, and did not contact Plaintiff's employer or any other entity about Plaintiff. Rothhaupt has not presented any evidence that Maiden knew of Rothhaupt's arrest or otherwise or condoned the particular conduct of anyone on the scene at the time the events occurred. While Plaintiff's response to Defendants Maiden, Dickow, and Seldon Scott's motion for summary judgment attempts to foist some responsibility on Maiden, arguing that he "was aware of the ongoing efforts of Defendants Dickow and [Seldon] Scott to defame Plaintiff without taking action," liability under § 1983 must be premised upon a violation of one's constitutional rights. [Response at 9.] *Lewellen v. Metro. Govt. of Nashville*, 34 F.3d 345, 347 (6th Cir. 1994). There is no constitutional right not be defamed by a government official. *Paul v. Davis*, 424 U.S. 693, 711-712 (1976); *Hall v. U.S.*, 704 F.2d 246, 252 (6th Cir. 1983).

It is clear that Maiden cannot be held individually liable for the stop of Plaintiff, the search of Plaintiff's car, Plaintiff's arrest, or defamation under § 1983 since there is no evidence that he was involved as required. Further, Plaintiff cannot identify a constitutional right related to defamation. Accordingly, the § 1983 claims pending against Maiden in his individual capacity, as described above, shall be dismissed.[3]

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[3] There remains only Rothhaupt's claim against Maiden for deprivation of property without due process of law in violation of the Fourteenth Amendment, a claim discussed by the Court below.

D. DEFENDANTS DICKOW AND SELDON SCOTT IN THEIR INDIVIDUAL CAPACITIES

In their motion for summary judgment, Defendants Dickow and Scott Seldon argue that they are due qualified immunity for the federal claims against them in their individual capacities. Under the federal doctrine of qualified immunity, police officers and other officials performing "discretionary functions are generally shielded from liability [in their individual capacities] for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992).

In determining whether a public official is entitled to qualified immunity, the Court must conduct a two-part analysis. *See Saucier*, 533 U.S. at 200; *Crockett v. Cumberland College*, 316 F.3d 571, 579 (6th Cir. 2003). As a preliminary matter, this court must inquire whether the facts alleged, when viewed in the light most favorable to the party asserting the injury, demonstrate that the alleged conduct violated a constitutional right.[4] *Saucier*, 533 U.S. at 200. Accordingly, the Court shall conduct a preliminary inquiry into whether or not Plaintiff has alleged facts that, viewed in the light most favorable to him, demonstrate that Defendants' conduct violated an

[4] Only if the violation of a constitutional right can be demonstrated, will the Court assess whether that right was clearly established at the time of the alleged violation such that a reasonable official would understand that the particular conduct at issue violated that right. *Saucier v. Katz*, 533 U.S. 194, 200 (2001); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

identifiable constitutional right. *See id.* As discussed below, it is clear that the facts do not demonstrate any violation, and the claims shall be dismissed.

1. SECOND AMENDMENT CLAIM

The Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia. *U.S. v. Miller,* 307 U.S. 174 (1939); *U.S. v. Napier,* 233 F.3d 394, 402 (6th Cir. 2000); *U.S. v. Warrin,* 530 F.2d 103, 106 (6th Cir. 1976). As Rothhaupt has not alleged that his possession of the rifle is in any way related to his involvement in a state militia organization, his Second Amendment claim must fail.[5] *See Potts v. City of Philadelphia,* 224 F.Supp. 2d 919, 939 (E.D. Pa. 2002) (revocation of citizen's gun permit fails to state a claim where evidence fails to suggest possession of gun was related to militia activities).

2. FOURTH AMENDMENT CLAIMS

Plaintiff claims that Defendants Dickow and Seldon Scott violated his Fourth Amendment rights because the initial traffic stop, search of his vehicle at the stop, and his

[5] Insofar as Rothhaupt complains of the search for and seizure of his rifle, the Court remarks that police officers may search for and confiscate weapons within the confines of the Fourth Amendment, and such searches and seizures are reasonable, necessary restrictions on an individual's Second Amenmdnet [sic] rights. *See Dickerson v. City of Denton,* 298 F.Supp. 2d 537, 540-541 (E.D. Tex. 2004). The search and seizure inquiry turns on probable cause, and the individual's claim is under the Fourth and not the Second Amendment. Rothhaupt's Fourth Amendment claim is addressed elsewhere in this opinion.

arrests were without probable cause.[6] He also alleges that Dickow used more force than reasonably necessary in effecting the arrest. For the reasons stated below, his claims under the Fourth Amendment shall be dismissed.

i. STOP AND ARREST

Plaintiff complains that his stop and arrest for trespass, a misdemeanor, by Defendant Dickow violated his Fourth Amendment right to be free from unreasonable search and seizure because Kentucky law does not permit an officer to arrest an individual without a warrant for a misdemeanor that takes place outside of the officer's presence.[7]

"Unless a deprivation of some federal constitutional or statutory right has occurred, § 1983 provides no redress even if the plaintiff's common law rights have been violated and even if the remedies available under state law are inadequate." *Lewellen*, 34 F.3d at 347. Thus, Defendant Dickow cannot be liable under § 1983 unless he

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[6] Plaintiff suggests in his response to Defendants' motion that he is bringing his malicious prosecution claim under 42 U.S.C. § 1983, a claim which would be understood in the context of the Fourth Amendment as it governs "deprivations of liberty that go hand in hand with criminal prosecutions." *Albright v. Oliver*, 510 U.S. 266, 273-75 (1994). The Court notes that his complaint lists only a state malicious prosecution claim. The Court will not permit an *ex post facto* amendment of his complaint at this late date by entertaining such a claim.

[7] Indeed, Kentucky's statute governing arrest, KRS 431.005, "codifies the common law rule and does not authorize a peace officer to arrest on suspicion of the commission of a misdemeanor as it does on suspicion of the commission of a felony, but limits arrest for a misdemeanor to one committed in the presence of the arresting officer." *Johnson v. Com.*, 443 S.W.2d 20, 22 (Ky. 1968).

violated one of Rothhaupt's federal constitutional rights.[6] Rothhaupt's rights under Kentucky law, including his right as an alleged misdemeanant to be arrested only when the misdemeanor is committed in the presence of the arresting officer, are not grounded in the federal Constitution and will not support a § 1983 claim. *Pyles v. Raisor,* 60 F.3d 1211, 1215 (6th Cir. 1995).

With regard to the constitutional implications of stopping Rothhaupt, it is well settled that police have the authority to stop and briefly detain a person for investigative purposes even if they lack probable cause to arrest so long as they have a reasonable suspicion supported by articulable facts of criminal activity or involvmenet [sic] in a completed crime. *Terry v. Ohio,* 392 U.S. 1 (1968). "Reasonable suspicion is measured and judged under the totality of the circumstances. *United States v. Sokolow,* 409 U.S. 1 (1989). It need not arise from the officer's personal knowledge and may be based on information received from others. *United States v. Hensley,* 469 U.S. 221 (1985). Defendant Dickow had received a dispatch concerning the Scotts' complaint of someone trespassing on their property and reporting that Rothhaupt was the suspected trespasser. Under the totality of the circumstances, the Court finds that Dickow had reasonable suspicion supported by articulable facts of suspected criminal activity by Rothhaupt sufficient to justify a stop

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[6] While the Court believes that the Fourth Amendment claims against Seldon Scott for Rothhaupt's stop and arrest can be dismissed solely on the grounds that Scott did not effect the stop or the arrest, the same rationale would apply to claims against him if his participation in the incident was deemed to be sufficient for an application of the analysis above.

of Rothhaupt's car, and any claim premised on the stop shall be dismissed.

Accordingly, the Court is left to consider the alleged violation of Rothhaupt's Fourth Amendment right to be arrested only on probable cause. Probable cause to make an arrest exists if the facts and circumstances within the arresting officer's knowledge were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964). In general, the existence of probable cause in a § 1983 action presents a jury question, unless there is only one reasonable determination possible. *Yancey v. Carroll County*, 876 F.2d 1238, 1243 (6th Cir. 1989).

The Court concludes that Dickow had probable cause to believe that Rothhaupt had trespassed on the Scotts' property. KRS 511.080(1) provides that "[a] person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises." Having received the dispatch regarding the Scotts' complaint of an individual trespassing on their property, Dickow informed Plaintiff that he was responding to a trespassing complaint. Plaintiff admitted that he had been present on the property, although he argued that it was with written permission. Seldon Scott, however, advised Dickow that Rothhaupt had refused to leave the Scotts' property when ordered to do so by Scott.[9] In making a probable cause assessment, an officer is entitled to rely on the statement of a witness or an alleged victim of a crime,

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[9] While Plaintiff disputes the truth of Scott's representation to Dickow, Rothhaupt does not dispute that Scott made the representation.

even if the person's statement is later found to be false. *See Ahlers v. Schebil*, 994 F.Supp. 856, 876-77 (E.D. Mich. 1988). The facts and circumstances of this case provided Dickow with probable cause to believe that Rothhaupt had committed the offense of trespassing on the Scotts' property.[10] Similarly, with regard to Rothhaupt's arrest under KRS 218A.210, a statute which provides that "[a] person to whom . . . any controlled substance has been . . . sold . . . may lawfully possess it only in the container in which it was delivered to him by the person selling it or dispensing the same," the Court finds that Dickow had probable cause to arrest Rothhaupt. Dickow found Ibuprofen 800 in Rothhaupt's vehicle, not in an original prescription container, and believed it to be a controlled substance for which a prescription is required. As probable cause existed for both arrests of Rothhaupt by Dickow, Rothhaupt's claims for arrest without probable cause shall be dismissed.

ii. JUSTIFIED SEARCH

A police officer may conduct a warrantless search of the passenger compartment incident to a lawful arrest of the automobile's occupants, so long as the search is contemporaneous in time and place with the arrest. *New York v. Belton*, 453 U.S. 454, 460 (1981); *United States v. Robinson*, 414 U.S. 218, 233 (1973); *Preston v. United States*, 376

[10] Further, if Dickow had probable cause to arrest Plaintiff for one offense, it is immaterial that probable cause was lacking to charge Plaintiff for any other crime. *Avery v. King*, 110 F.3d 12, 13 (6th Cir. 1997). Since Dickow had probable cause to arrest Plaintiff for trespassing, it is immaterial whether he had probable cause to arrest him for stalking or harassing communications.

U.S. 364, 367 (1964). As discussed above, Defendant Dickow had probable cause to arrest Plaintiff. The arrest was lawful, Rothhaupt had been an occupant of the passenger compartment of the car, and the search was conducted contemporaneously with the arrest. Accordingly, Rothhaupt's claim for a search in violation of the Fourth Amendment fails.

iii. FORCE REASONABLY NECESSARY TO EFFECT ARREST

No doubt the right to make an arrest "carries with it the right to use some degree of physical coercion or threat to effectuate the arrest." *Graham v. Connor,* 490 U.S. 386, 396-97. Even those actions that may later seem unnecessary upon review by a judge do not necessarily violate the Fourth Amendment in recognition of the fact that officers are "often forced to make split-second judgment[s] – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* Accordingly, this Court will evaluate the claim by considering the "particular facts and circumstances of [the] case, the severity of the crime, the threat posed by the suspect, and whether the suspect [was] 'actively resisting the arrest or attempting to evade arrest by flight.'" *Ferguson v. Leiter*, 220 F.Supp. 2d 875, 880 (N.D. Ohio 2002).

In order to hold Dickow liable for the use of excessive force, Rothhaupt must demonstrate that the officer "(1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive

force."[11] *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997) (*citing Durham v. Nu'Man*, 97 F.3d 862, 866 (6th Cir. 1996); *Walton v. City of Southfield*, 995 F.2d 1331, 1340 (6th Cir.1993); *Bruner v. Dunaway*, 684 F.2d 422, 426 (6th Cir.1982).

In the instant matter, the underlying alleged trespass for which Dickow sought to take Plaintiff into custody was, on its face, non-violent. Certainly, prior to the stop and the arrest, Rothhaupt had engaged in heightened rhetoric with the Scotts. Nonetheless, Rothhaupt did not resist the arrest and, from the evidence available to the Court, was compliant with Dickow's requests during the incident. All of these factors are clearly relevant to a determination of what force was necessary under the circumstances.

Turning now to the issue of what force was used, the Court understands that Dickow handcuffed Rothhaupt, placed his hands on Rothhaupt's back and escorted him to a cruiser. When the two approached the car, Dickow pushed Rothhaupt's head down so that he could sit in the rear of the cruiser without hitting his head on the roof of the cruiser in the process. There is no evidence that Dickow used any other force during his interactions with

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[11] Even if the Court assumes that Seldon Scott was acting under color of state law during the incident in question, it is clear that he did not play a hands-on role in the handcuffing or escorting of Rothhaupt to the car. Certainly, a police officer who fails to act to prevent the use of excessive force may be held liable when "(1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had, both the opportunity and the means to prevent the harm from occurring." *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997). As described above, it is clear that the force used was not excessive, and the Court shall entertain the claim against Defendant Seldon Scott no further. It shall be dismissed.

Rothhaupt, and the force used was reasonable to effect the arrest and does not rise to the level of a constitutional violation.[12] His claim shall be dismissed.

3. DEPRIVATION OF PROPERTY

Rothhaupt alleges that Maiden and Dickow violated his Fourteenth Amendment right to be free the deprivation of property by the State "without due process of law" by failing to return all of the property seized during the search of his car.[13] Notably, however, all of the items seized pursuant to the warrant obtained by Dickow have been returned except for the four glass mugs that were the subject of the disputed eBay transaction. Be has no claim for those items now returned to him. The set of mugs, held by the Sheriff's Department, was not returned because it was excluded from the Carroll District Court order to the Sheriff's Department to release all seized property to Rothhaupt at the conclusion of the criminal case against Rothhaupt.

In his response to Defendants Maiden, Dickow, and Seldon Scott's motion for summary judgment, Rothhaupt, now asserts that Maiden and Dickow unlawfully retained

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[12] In fact, Plaintiff seems to complain only of the fact of his arrest and not the attributes of his arrest. As the Court has already determined that his arrest was not unconstitutional, the Court declines to permit him to argue that claim again under the guise of an excessive force claim.

[13] Notwithstanding the language in his complaint indicating that Defendants Maiden, Dickow, and Seldon Scott were involved in depriving him of his property, Rothhaupt has presented no evidence to suggest that Seldon Scott is liable in any way for such a wrong. Accordingly, the Plaintiff's Fourteenth Amendment claim against Seldon Scott shall be dismissed.

"hundreds of documents, including 401k retirement account records and payment checks, as well as receipts and canceled checks relating to his entire Pfaltzgraff collection . . . [and] several heirlooms that the Plaintiff had received following his father's death" were seized during the search of his vehicle. [Response at 17]. None of these items were listed on Dickow's inventory following his warranted search of the car. Certainly, that alone is not proof that the items were not seized, but the Court cannot ignore that Plaintiff has supplied no other proof that any of these items were taken or were otherwise in the possession of Dickow. It is pure speculation to assert that Dickow seized an item simply because Plaintiff cannot locate it.

In any event, while exhaustion of state judicial and administrative remedies is not a prerequisite to initiating a federal court suit under § 1983, a plaintiff cannot allege a due process violation when seeking a postdeprivation remedy for an alleged random and unauthorized deprivation of, property by a government officer where the state provides an adequate postdeprivation remedy. *Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Parratt v. Taylor*, 451 U.S. 527 (1981); *McNeese v. Board of Education*, 373 U.S. 668 (1963); *Monroe v. Pape*, 365 U.S. 167, 183 (1961). While *Parratt* does not impose an exhaustion requirement, it defines the contours of procedural due process violation which accrue only upon a demonstration that an individual has been "deprived of property under color of state law" and that "the deprivation did not occur as a result of some established state procedure." *Parratt*, 451 U.S. at 543. This is to say that a plaintiff must demonstrate that "the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure." *Id.* While some of the items have been returned to Plaintiff

by virtue of a state procedure and he has not demonstrated any evidence in support of his allegation that Dickow took some of the other items, he has not suggested that he has attempted to use any state procedure to retrieve any [sic] the remaining item [sic], the set of mugs. His conclusory assertion that available state law remedies would "not necessarily be adequate" to address his alleged loss is insufficient. It is quite clear that a state law action for conversion would be, as a matter of law, adequate to redress claims similar to Plaintiff's claims. *See Parratt*, 451 U.S. 527; *Fox v. Van Oosterum*, 176 F.3d 342, 349 (6th Cir. 1999). He cannot yet argue that some procedure was due and not provided, and his claim against Maiden and Dickow shall be dismissed without prejudice.

II. STATE CLAIMS

28 U.S.C. § 1367(c) provides that a district court:

> may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction.

In his complaint, Plaintiff invoked the jurisdiction of this Court by virtue of 28 U.S.C. §§ 1331 and 1343, citing the questions of federal law presented by his action. The Court has dismissed all claims arising under 42 U.S.C. § 1983, over which it had original jurisdiction. The Court now declines to continue exercising supplemental jurisdiction under 28 U.S.C. § 1367 over those remaining state claims pending against Defendants. All remaining state claims shall be dismissed without prejudice.

CONCLUSION

For the reasons stated above, Defendants' motions for summary judgment shall be granted.

Accordingly, **IT IS ORDERED** that Defendants' motions for summary judgment [Record Nos. 20 & 23] be, and the same hereby are, **GRANTED.**

This the 21st day of June, 2004.

[SEAL] Signed By:

Joseph M. Hood **JMH**
United States District Judge

UNITED STATE [sic] DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

JAY HOWARD ROTHHAUPT, Plaintiff, v. CHARLIE MAIDEN, *et al.*, Defendants.	Civil Action No. 02-84-JMH **JUDGMENT** (Filed Jun. 21, 2004)

* * *

In accordance with the Court's order of even date and entered contemporaneously herewith,

IT IS HEREBY ORDERED:

(1) that Plaintiff's 42 U.S.C. § 1983 claim against Defendants Maiden and Dickow for deprivation of property without due process of law in violation of the Fourteenth Amendment be, and the same hereby is, **DISMISSED WITHOUT PREJUDICE;**

(2) that Plaintiff's remaining federal claims, all brought pursuant to 42 U.S.C. § 1983, be and the same hereby are **DISMISSED WITH PREJUDICE;**

(3) that Plaintiff's state law claims be, and the same hereby are, **DISMISSED WITHOUT PREJUDICE;**

(4) that this action be, and the same hereby is, **DISMISSED AND STRICKEN FROM THE ACTIVE DOCKET;**

(5) that all pending motions be, and the same hereby are, **DENIED AS MOOT;** and

(6) that all, scheduled proceedings be, and the same hereby are, **CONTINUED GENERALLY.**

This the 21st day of June, 2004.

[SEAL] Signed By:

***Joseph M. Hood* JMH**
United States District Judge

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No. 05-569

In the Supreme Court of the United States

JAY HOWARD ROTHHAUPT,

Petitioner,

v.

CHARLIE MAIDEN, JR., Carroll County Sheriff, in his individual and official capacities; RON WAYNE DICKOW, Deputy Carroll County Sheriff, in his individual and official capacities; and, SELDON SCOTT, individually and in his official capacity as Special Deputy Director of Public Safety for Carroll County,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Sixth Circuit correctly upheld the district court's decision granting summary judgment in favor of Carroll County Sheriff Charlie Maiden, Deputy Ron Wayne Dickow and Special Deputy Seldon Scott in their individual capacities on Petitioner's Fourth and Fourteenth Amendment claims.

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COUNTERSTATEMENT OF CASE

As a hobby, Seldon and Phyllis Scott sell collectibles and antiques through eBay, an internet website that hosts online auctions. (R. 22 Jury Trial Transcript, p. 9). In July 2001, the Scotts placed four Pfaltzgraff Heritage tumblers for auction on eBay in a listing that contained a picture of the items and a brief description indicating that one of the tumblers had a "manufacture flaw in the glaze on the rim." (R. 20 Carroll County Defendants Motion for Summary Judgment, Exh. 1). Petitioner, who lives in Colorado Springs, participated in this auction and submitted the winning bid of $59.00 for the tumblers. (R. 20 Motion for Summary Judgment, Exh. 2).

After receiving the tumblers, Petitioner sent an email message to the Scotts, claiming:

> ...the four tumblers...have the following flaws:
>
> Tumbler 1. Varying width of missing glaze (approx. 1/8" wide average) around approx 80% of the bottom edge.
>
> Tumbler 2. Extensive, dark cracks in the glaze (aka crazing) over both the exterior and interior. Varying width of missing glaze (approx 1/8" wide average) around approx 2/3 of the bottom edge.
>
> Tumbler 3. Two pits in the glaze on the interior and one pit on the top of the rim. Section of missing glaze approx 1 mm x 2 mm on the edge of the rim. Varying width of missing glaze (approx 1/8" wide average) around approx 90% of the bottom edge. Glaze cracks over several square inches of the interior.

> Tumbler 4. Pit in the glaze on the top of the rim. Extensive glaze bumps approx 1 mm diameter or less on the entire exterior (except for the pedestal). No glaze missing from the bottom edge.

The message further asked the Scotts to "let me know your position regarding the obvious, undescribed flaws." (R. 20 Motion for Summary Judgment, Exh. 3).

Through July 31, 2001, Petitioner and the Scotts exchanged email messages in an attempt to resolve the dispute. Initially, Mrs. Scott offered Rothhaupt a full refund without questioning his assertions about the defects in the tumblers. She explained, "...we do this as a hobby and we try to describe the items to the best of our ability and do not try to deceive anyone." (R. 20 Motion for Summary Judgment, Exh. 4).

Subsequently, Petitioner indicated that a full refund would not be an acceptable resolution of the matter since he objected to paying the cost of postage to return the item. In addition, he hinted he was seeking additional compensation from the Scotts, stating:

> ...a refund does not satisfy your contractual requirement for the subject auction...If a buyer were satisfied having the money instead of having the items described in the auction, the buyer wouldn't have bid on the auction. Please let me know if you have any alternatives - I'm optimistic this problem can be resolved.

(R. 20 Motion for Summary Judgment, Exh. 5).

The following day, Mr. Scott sent Petitioner an email message again offering to provide Petitioner a full refund upon return of the tumblers. (R. 20 Motion for Summary Judgment, Exh. 6). Petitioner responded by declining the full refund, accusing the Scotts of fraud and threatening to file an eBay "fraud report." (R. 20 Motion for Summary Judgment, Exh. 7).

On July 30, 2001, Mr. Scott offered – for the third time – to provide Petitioner a full refund, offered to pay return shipping charges, and invited Petitioner to telephone Scott at Scott's expense so the two could discuss the matter. Mr. Scott indicated the Scotts felt unnecessarily harassed by the tone and suggestions contained in Petitioner's communications. He said that, in his estimation, the Scotts had "done all that is possible" to address Petitioner's dissatisfaction with the tumblers. (R. 20 Motion for Summary Judgment, Exh. 8).

The next day, Petitioner responded by accusing the Scotts of lying:

> I'll start by identifying your falsehoods...clearly there are additional things you can do to resolve the problem you've caused via your fraud, so your claim that you 'have done all that is possible' is false. Perhaps you're confusing the set of things you're 'willing' to do with the set of things you 'can' do.

(R. 20 Motion for Summary Judgment, Exh. 9). In addition, Petitioner advised the Scotts that he intended to file a complaint with PayPal, the internet website that facilitated Petitioner's electronic payment for the tumblers, as well as a fraud complaint with the U.S. Postal Service. (R. 20 Motion for Summary Judgment, Exh. 9). Rothhaupt did not indicate whether he intended to return or keep the tumblers. After this

July 31 communication, Petitioner and the Scotts had no further communications until the day of the arrest that is the subject of this action.

In the meantime, Mr. Scott, who is a Special Deputy with the Carroll County Sheriff's Department, had begun to communicate some of his difficulties with Rothhaupt to his co-workers. (Charlie Maiden at TR 18-19, 21-22; Ron Dickow at TR 11-12). In particular, Mr. Scott told Deputy Ron Dickow about his online transaction with Petitioner, that Petitioner was unhappy with the item, and that Petitioner was communicating with the Scotts in an annoying and alarming way. (Ron Dickow at TR 7, 11-12).

In addition, because they were suspicious of Petitioner and unnerved by his accusations, the Scotts contacted other eBay users who had dealt with Petitioner to determine if they had the same experience. The Scotts received a number of responses, including one from a woman who "really didn't want to say anything bad about [Petitioner] because I am afraid of him"; from someone who reported receiving "threatening and nonproductive" messages from Petitioner; and from a woman who indicated that Petitioner's communications with her were becoming "more threatening, more bullying." (R. 20, Motion for Summary Judgment, Exh. 10).

At approximately 4:15 p.m. on September 21, 2001, a mere ten days after "9-11," Mrs. Scott, answered the telephone at her home in Carrollton, Kentucky. A male caller said he had a package to deliver to 1712 Hilltop Drive (the Scotts' address), indicated he was "not far away," that he would be there "in just a few minutes," and asked whether anyone would be home to accept the delivery. (Rothhaupt at TR 115-116). He did not identify himself by name or